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FILED
NOV 3 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-205

In the Supreme Court of the United States

October Term, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT,
Petitioner,

v.

STANLEY ORZEL,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Page

TABLE OF CONTENTS

I. RECENT CASES INVOLVING THE CONFLICT IN CIRCUITS 1

II. THE LIQUIDATED DAMAGES ISSUE 2

III. THE STATUTE OF LIMITATIONS 4

IV. PARTIES CANNOT CONFER JURISDICTION UPON A MAGISTRATE BY CONSENT 4

CONCLUSION 5

TABLE OF CASES

Bowman v. Dept. of Justice, 510 F.Supp. 1183 (E.D. Va. 1981), aff. 679 F.2d 876, *cert. den.* 103 Sp. Ct. 494 2

Criswell v. Western Airlines, — F.2d —, 32 FEP 1204 (9th Cir. 1983) 1

EEOC v. University of Texas, 710 F.2d 1091 (5th Cir. 1983) 1

EEOC v. Wyoming, — U.S. —, 103 Sp. Ct. 1054, 75 L.Ed.2d 18 ..... 1, 2

Heiar v. Crawford County, 82-C-273 (W.D. Wis. 1983), unreported 1

Hoefelman v. Conservation Commission, — F.2d —, 32 FEP 1773 (8th Cir. 1983) 1

Johnson v. City of Baltimore, 515 F.Supp. 1287 (Md. Dist. 1983) 2

Page

Maki v. Comm. of Education, 32 FEP 630 (N.D. N.Y. 1983) 1

Pacemaker v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983) 4

Vance v. Bradley, 440 U.S. 93 2

Whitfield v. City of Knoxville, 32 FEP 1052 (E.D. Tenn. 1983) 3

OTHER AUTHORITIES

Rule 15, Fed. R. Civ. P. 4

I. RECENT CASES INVOLVING THE CONFLICT IN CIRCUITS.

A. In *EEOC v. University of Texas,* 710 F.2d 1091 (5th Cir. 1983) the court affirmed the finding of the district court that age was a BFOQ permitting the University to reject applicants for employment as campus law enforcement officers at age 45.

B. In *Hoefelman v. Conservation Commission,* — F. 2d —, 32 FEP 1773 (8th Cir. 1983) the court affirmed a district court decision which held that pilots above the age of 60 could be prohibited from flying state Conservation Commission aircraft. The Commission had done no independent research of its own prior to formulating its retirement policy and relied solely on the studies made by the FAA. Conflicting medical evidence was introduced at trial by the respective parties and the court accepted the testimony of the defense experts. See also *Criswell v. Western Airlines,* — F.2d —, 32 FEP 1204 (9th Cir. 1983).

C. In *EEOC v. Wyoming,* — U.S. —, 103 Sp. Ct. 1054, 75 L.Ed.2d 18 (1983), on remand to the district court for trial, the jury made the finding that age 55 was a BFOQ for conservation wardens in the State of Wyoming, *New York Times,* October 13, 1983, p. 15.

D. In *Maki v. Comm. of Education,* 32 FEP 630 (N.D.N.Y. 1983) the court held that age 65 was a BFOQ for school bus drivers.

E. In *Heiar v. Crawford County,* 82-C-273 (W.D. Wis. 1983) *unreported,* conflicting medical testimony was offered by the parties and the trial court accepted the testimony of the medical experts called by the plaintiffs. The court held that age 55 was not a BFOQ for deputy sheriffs.

A decision involving firefighters to the same effect was made in *Johnson v. City of Baltimore,* 515 F.Supp. 1287 (Md. Dist. 1981) in which the trial court chose to accept the testimony of the plaintiff's experts instead of the testimony of the experts called by the defense. An appeal is pending in the 4th Circuit.

The legislatures, both state and federal, have established a uniform retirement policy to be applied to law enforcement and firefighter classifications. But the developments under ADEA in the trial and appellate courts are presenting a checkered pattern with different results being reached on a state to state and district to district basis.

The state agencies look to this Court for a uniform rule; one which will permit them to fund a uniform retirement system for law enforcement and firefighting personnel, and permit them to recruit, train, promote and replace the retirees on a predictable schedule, as does the federal government. *Vance v. Bradley,* 440 U.S. 93; *Bowman v. Dept. of Justice,* 510 F.Supp. 1183 (E.D. Va. 1981), aff. 679 F.2d 876, *cert. den.* 103 Sp. Ct. 494.

II. THE LIQUIDATED DAMAGES ISSUE.

A number of cases are still pending in the lower courts that arose because of retirements that occurred shortly after the 1978 amendments to the federal ADEA. One of the serious legal issues presented in those cases was the constitutionality of the application of this federal law to the state and local governments. This issue was not resolved until the decision of this Court in ***EEOC v. Wyoming,*** — U.S. —, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983).

In *Whitfield v. City of Knoxville*, 32 FEP 1052 (E.D. Tenn. 1983) the court specifically held the City's actions were not willful violations of ADEA because they were "taken in good faith and reliance on the theory that the Act could not constitutionally be applied to the City."

However, in addition to litigating in good faith the unsettled legal issues in this area of the law, affirmative evidence of the City's *good faith* is present in this case.

On December 18, 1979 (within one year of his retirement) the City advised counsel for respondent that his client should return to work and arrangements were made for the routine pre-employment physical examination (D. Exh. "U"). The response was a refusal to submit to a physical (D. Exh. "V"). All settlement discussions occurred subsequent to this correspondence (Exh. "DD"). The respondent was unilaterally returned to work on February 2, 1981 without a physical examination and *prior* to the commencement of the trial (Tr. 81). He is still working at this time.

In addition, the City amended its ordinance temporarily raising the retirement age from 55 to 60 to avoid causing further retirements and litigation of this kind.

Finally, there was no basis for ordering liquidated damages as a deterent since the City had amended its ordinance thus showing its willingness to comply with federal law. The City was unwilling to totally capitulate to the plaintiff's claim in the case at bar. However, a good faith effort to litigate the kind of issues involved in these proceedings is not evidence of a "willful" violation of law.

III. THE STATUTE OF LIMITATIONS.

The statute of limitations, while not raised in the pleadings, was raised at trial. The Magistrate sustained the plaintiff's objection to the receipt of the evidence offered to show that the statute barred the action (Tr. 79-80). Under Rule 15 of the Federal Rules of Civil Procedure the trial court should have accepted the evidence, examined it and considered whether there was any prejudice to the respondent in giving consideration to that legal issue.

IV. PARTIES CANNOT CONFER JURISDICTION UPON A MAGISTRATE BY CONSENT.

In *Pacemaker v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983) the court specifically rejected the position advanced here by the respondent that the litigants' consent to the trial before the Magistrate was sufficient to satisfy the Article III concerns. Parties cannot confer jurisdiction by consent or waiver. The court held in *Pacemaker* that "the requirement of an article III judge is jurisdictional and thus not waivable." (712 F.2d at p. 1312).

CONCLUSION

The issues presented in the Petition are of great importance to the communities in the nation that are responsible for providing police and fire protection for their residents. The age of the personnel working in these departments is of critical importance and age has been recognized as a relevant factor by both Congress and the state legislatures in the recruitment and retirement of these employees. However, with some courts accepting and others rejecting these legislative findings, municipal employers will be unable to act uniformly in the recruitment and retirement of law enforcement and firefighting personnel unless this Court resolves the judicial conflict. For these reasons, and for the reasons stated in the Petition, it is respectfully submitted that this Petition be granted.

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